Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

DR. MUNIR UWAYDAH,

Petitioner,

v.

G.E. MEDICAL SYSTEMS EUROPE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID A. FREEBURG
Counsel of Record
McFADDEN & FREEBURG CO., LPA
1370 ONTARIO STREET
SUITE 1700
CLEVELAND, OH 44113
(216) 622-0850
(216) 622-0854 FAX
freeburg@mcfaddenlaw.us

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

1. Whether it is an abuse of discretion to deny a motion for relief from a sanction order, which was the result of attorney misconduct and not that of a party's own actions.

2. Whether it is an abuse of discretion for the district court to rely upon an order that violates the stay provision of 11 U.S.C.S. § 362, in issuing a subsequent sanction order.

3. Whether a forum selection clause contained within an international contract, which is the underlying the subject matter of the action, required the district court to dismiss the case.

4. Whether a claim under an alter-ego theory of liability, belongs to a bankruptcy debtor-corporation, or creditors of that corporation under 11 U.S.C.S. § 541.

5. Whether a Court of Appeals can make a finding of fact under de novo review, contrary to the facts contained within the evidence attached to movant's motion for summary judgment, pursuant to Federal Civil Procedure Rule 56.

PARTIES TO THE PROCEEDINGS

Petitioner Dr. Munir Uwaydah was the Defendant-Appellant in the Sixth Circuit Court of Appeals below.

G.E. Medical Systems, Europe, a French Corporation, was the Plaintiff-Appellee in the Sixth Circuit Court of Appeals below. G.E. Medical Systems, Europe filed in the case below a corporate disclosure statement, pursuant to 6th Cir. R. 26.1. A copy of the disclosure statement is contained within its Brief on Page i, Appellate Brief of G.E. Medical Systems, Europe.

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PETITION FOR WRIT OF CERTIORARI

David A. Freeburg, Esq., on behalf of and as attorney for Dr. Munir Uwaydah, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, filed on November 22, 2006, for which a timely motion to reconsider, pursuant to Federal Rule of Appellate Procedure 40 was filed on December 6, 2006 and denied on January 26, 2007.

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit dated November 22, 2006 affirming the decision of the District Court for the Northern District of Ohio not recommended for publication is reproduced at App. B at 3a.

The decision and order of the United States District Court for the Northern District of Ohio, Eastern Division granting plaintiff's motion for summary judgment dated August 5, 2005 is reproduced at App. C and D at 9a and 22a.

A petition for rehearing was filed on December 6, 2006 and denied on January 26, 2007. The denial of the petition for rehearing is reproduced at App. A at 1a.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on November 22, 2006, and a timely filed petition was filed and denied on January 26, 2006. This appeal is timely filed pursuant to 28 U.S.C.S. § 2101 and Supreme Court rule 13.3 because it is filed within ninety days of the entry denying the petition for rehearing. This Court has jurisdiction to review the order of

the United States Court of Appeal for the Sixth Circuit pursuant to 28 U.S.C.S. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is The fifth Amendment to the United States Constitution which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant statutory provisions are the United States Bankruptcy Code, 11 U.S.C.S. § 362, 11 U.S.C.S. § 541, Federal Civil Procedure Rule 56, and 28 U.S.C.S. § 1332 reproduced at App. F at 25a -64a.

STATEMENT OF THE CASE

Jurisdiction of the district court was invoked pursuant to 28 U.S.C.S. § 1332 (general diversity jurisdiction). The Plaintiff's claims were based on an international contract between Plaintiff and Defendant Prometheus Health Imaging, Inc. The contract was for the purchase of a CT Scanner, which Plaintiff was required to manufacture and deliver to a location in Saudi Arabia, and Defendant Prometheus Health

Imaging, Inc., was to pay for in accordance with the payment terms.

A. Summary of Proceedings Below

On September 19, 2002 Plaintiff General Electric Medical Systems, Europe (GEMS) filed a Complaint against numerous Defendants including Dr. Munir Uwaydah (Uwaydah) and Prometheus Health Imaging, Inc. (Prometheus). **(R.1 Complaint.)** The Complaint alleged breach of contract, promissory estoppel, Unjust Enrichment, Alter Ego, Conversion, and fraud. **(R. 1 Complaint.)**

On January 14, 2003 Dr. Uwaydah filed for bankruptcy protection in the Central District of California, L.A. **(R. 38 Notice of Filing Chapter 7.)** On January 17, 2003, the United States Bankruptcy Court for the Central District of California, L.A. issued notice to creditors of the Bankruptcy of Dr. Uwaydah. **(R.87 Motion for Relief from Sanctions.)** As a creditor listed on the creditor matrix, GEMS, through its counsel, received notice of the bankruptcy filing of Dr. Uwaydah. **(R. 87 Motion for Relief from Sanction.)**

On January 29, 2003 the district court ordered Uwaydah to provide rule 26 disclosures to GEMS , including the documents and/or the location of the moneys released under a letter of credit between Prometheus and Al-Banader International Group (ABIG). **(R. 27 January 29, 2004 Order.)**

On February 11, 2003 Franz Ward, counsel for Uwaydah, filed a motion to withdraw as counsel. **(R. 29 Motion to Withdraw.)**

On March 27, 2003 GEMS served Uwaydah's former counsel Franz Ward with a subpoena requesting the production of "All documents regarding or relating to Prometheus Health Imaging, Inc., or Dr. Munir Uwaydah." **(R. 33 Motion to Compel Compliance.)** On May 15, 2003 Franz Ward filed a Memorandum in Opposition to Motion to Compel, sighting reasons that (1) the request was overly broad and subject to the protection of attorney-client privilege; (2) Franz Ward no longer represented either Uwaydah or Prometheus and was not authorized to release the documents; and (3) Franz Ward's professional obligations prevented disclosure. More importantly, Franz Ward also put the district court on notice that Uwaydah had filed a bankruptcy and provided the date and case number. Franz Ward pointed out to the court that Plaintiff and Plaintiff's counsel had notice of the bankruptcy filing. **(R. 34 Memorandum in Opposition to Motion to Compel.)**

On May 16, 2003, even though both the district court and GEMS' counsel had notice of the bankruptcy of Uwaydah, the district court issued an order to show cause why Uwaydah should not be held in contempt for failure to follow the Court's Orders. **(R. 37 May 16, 2003 Order.)** On May 16, 2003 Uwaydah's Bankruptcy Counsel from California filed with the district court a notice of filing bankruptcy. The docket shows that this was filed pro se. **(R. 38 Notice of Bankruptcy.)**

On June 4, 2003 the district court ordered Franz Ward to produce to the Court for an in-camera inspection its entire file to its representation of Prometheus and Uwaydah. **(R. 39 June 4, 2003 Order.)**

On June 11, 2003 the district court issued an order staying further proceedings against Uwaydah. **(R. 41 June 11, 2003 Order.)**

On July 30, 2003 Plaintiff filed a notice of filing stipulation to stay adversary proceeding and permit United State District Court of the Northern District of Ohio to proceed.[1] **(R.47 Notice of Stipulation.)** On August 11, 2003 the district court issued an order lifting the stay as to Uwaydah. **(R. 47 August 11, 2003 Order.)**

On October 31, 2003 the district court affirmed its previous Order with respect to parties' obligations to comply fully with Rule 26, and required defendants to produce "all required information to Plaintiff by 11/3/2003." **(R.51 October 31, 2003 Order.)** October 31, 2003 was a Friday and November 3, 2003 was the following Monday, giving Uwaydah one business day to respond to the order.

On November 5, 2003, Attorney Jamie Serrat entered an appearance on behalf of Uwaydah, who was unrepresented from the time of the withdrawal of Franz Ward.[2] **(R. 52 Notice of Substitution of Counsel.)**

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[1] It should be noted that the Adversary Proceeding filed in the United States Bankruptcy Court for the Central District of California, L.A. was filed on April 21, 2003, proving GEMS at all times relevant to obtaining the show cause order was aware of the bankruptcy or stay.

[2] Plaintiff has argued in several briefs that Attorney Greg Gordillio had been representing Uwaydah in the proceedings, as well as representing Prometheus however a review of docket shows the Attorney Gordillio never filed a formal notice of appearance on behalf of Uwaydah.

On November 11, 2003 Plaintiff filed a motion for contempt and Renewed Motion for Sanctions against Uwaydah. **(R. 53 Motion for Contempt and Renewed Motion for Sanctions.)** In that motion, Plaintiff acknowledges receipt of some of the documents on November 4, 2003 but argued that additional information was necessary. Even more troubling, Plaintiff argued to the Court that the documents should have been produced in accordance with the January 22, 2003 order, and argued to the District Court that the delay was a tactic of Uwaydah. **(R. 53 Motion for Contempt and Renewed Motion for Sanctions.)**

On November 17, 2003 Uwaydah filed a Response to Court Order to Show Cause and Notice of Compliance, showing that Uwaydah had in fact responded to the district court's order requiring production of the information to Plaintiff. **(R. 54 Notice of Compliance.)**

On September 8, 2004 the district court terminated the Motion for Contempt, stating that the parties are continuing with discovery. **(R. 63 Order Terminating Motion for Contempt.)**

On November 22, 2004 Plaintiff filed a Renewed Motion for Sanctions, alleging that Uwaydah "has a history of delay, deception, and failure to comply with even the most basic of discovery obligations." **(R. 65 Renewed Motion for Sanctions.)** GEMS immediately refers the court to the June 23, 2003 Motion when GEMS first requested sanctions against defendants for discovery violations. The request for sanctions referred to by GEMS was against Prometheus not against Uwaydah. **(See R. 42 Reply to Defendant Prometheus Health imaging's Response to Order to Show Cause.)** The remainder of the motion concerns the problems of scheduling the deposition of Uwaydah between counsel for

Prometheus, Uwaydah and GEMS. All of the Exhibits to the motion are communications relating to availability for deposition, not refusal or otherwise failure to attend such a deposition. **(R. 65 Renewed Motion for Sanctions.)**

On the same day as filing the Renewed Motion for Sanctions, Plaintiff filed a Motion for Summary Judgment. **(R. 66 Motion for Summary Judgment.)**

On November 24, 2004 Prometheus filed bankruptcy protection in the United States Bankruptcy Court for the Central District of California, LA being case no. LA 04-33283. **(R. 66 Motion for Summary Judgment.)**

On December 11, 2004 Dr. Uwaydah's counsel filed a response to the Renewed Motion for Sanction, stating that the discovery "dispute" was that counsel for the parties were unable to schedule the depositions, and had nothing to do with Uwaydah refusing to appear or be made available for deposition. **(R. 68 Brief in Opposition to Plaintiff's Motion for Sanctions.)**

On January 10, 2005 a notice that Prometheus had filed bankruptcy was filed with the District Court. **(R. 74 Notice of Filing Bankruptcy.)**

On January 28, 2005 Uwaydah filed his opposition to Plaintiff's Motion For Summary Judgment. **(R. 80 Opposition to Summary Judgment.)**

On May 2, 2005 the district court ordered sanctions against Uwaydah for "failure to comply with his Rule 26 discovery obligations and his refusal to make himself available for deposition." **(R. 84 May 2, 2005 Sanction Order.)**

On June 15, 2005 Attorney Jamie Serrett filed a motion to withdraw as counsel for Uwaydah. **(R. 85 Motion to Withdraw.)**

On June 24, 2005 Dr. Uwaydah filed a Motion for Relief from Judgment of the sanction order, alleging attorney misconduct on the part of attorney Serrett. **(R. 87 Motion for Relief.)** Plaintiff filed an opposition to the motion for relief from judgment on July 11, 2005. **(R. 89 Opposition to Motion for Relief.)** On July 13, 2005 the district court denied the Motion for Relief from Judgment based entirely upon "grounds stated in Plaintiff's Opposition." **(Order Denying Motion for Relief, non-document only on docket.)**

On August 5, 2005 the district court granted the Plaintiff's Motion for Summary Judgment, which relied entirely upon the sanction order against Uwaydah regarding his testimony and entered judgment against Uwaydah. **(R. 90 Order Granting Motion for Summary Judgment); (R.91 Judgment Entry.)**

On August 22, 2005 Dr. Uwaydah filed a notice of appeal of the Order Granting Summary Judgment and Judgment Entry. **(R. 93 Notice of Appeal.)**

The United States Court of Appeals for the Sixth Circuit, affirmed the granting of the motion for summary judgment as to the fraud count only, and found the remaining issues moot, including the sanction issue. **(Court of Appeals Opinion, App. B, p3a.)**.

B. Summary of Facts

On June 2, 2001, Prometheus and Al-Banader International Group, a company organized under the laws of

the Kingdom of Saudi Arabia (ABIG) entered into a joint venture agreement. **(R. 66 Plaintiff's Motion for Summary Judgment.)** In accordance with the terms of the joint venture agreement, ABIG was to provide a letter of credit in the amount of $1,000,000 to Prometheus. **(R. 66 Plaintiff's Motion for Summary Judgment.)** In exchange Prometheus was to provide a total body screening CT Scanner, the cost of which was to be borne by Prometheus. In addition, Prometheus was to provide all technical support to equip and manage the project, under the same standards employed under its center in Philadelphia, PA. **(R. 66 Plaintiff's Motion for Summary Judgment.)**

On or about July 26, 2001, entered into a agreement for the purchase of a CT scanner. **(R. 5 Prometheus' Motion to Dismiss.)** The terms of the agreement is memorialized through several written documents and amendments including (a) a letter agreement and amendment executed by both parties; (b) GE Medical Systems S.A. Standard Terms and Conditions of Export Sales; and (c) Special terms of Export Sales. **(R. 5 Affidavit of Joseph M. Saponaro, Prometheus' Motion to Dismiss.)** Under the Special Terms and Conditions for Export, Prometheus was the buyer and End User of the CT Scanner, for the price of $1,070,000. (R. 66 Plaintiff's Motion for Summary Judgment.) Under GE Medical Systems S.A. Standard Terms and Conditions of Export Sales Article 24, requires the contract to be governed by the laws of France, and all disputes arising out of or in connection with the sales contract to be settled by the competent Paris courts. **(R. 5 Prometheus' Motion to Dismiss.)**

On September 24, 2004 Joseph Saponaro as part of the contract confirmed the payment of $107,000 down payment from Prometheus to GEMS and provided instructions that

GEMS must comply entirely with the instructions contained within the letter of credit between ABIG and Prometheus. **(R. 5 Prometheus' Motion to Dismiss.)** This was confirmed by Alex McFarlane of GEMS. (R. 5 Prometheus' Motion to Dismiss.) Under the agreement between GEMS and Prometheus, Prometheus was always intended to be the buyer and end user of the CT Scanner. **(R. 5 Prometheus' Motion to Dismiss.)**

After the agreement was entered into, GEMS had numerous failures in delivery. On November 16, 2001 GEMS sent a letter to Prometheus acknowledging a "further mishap in the expediting of the GE Lightspeed CT." **(R. 80 Uwaydah Opposition to Motion for Summary Judgment.)** On November 17, 2001 GEMS sent a communication directly to ABIG stating that the CT Scanner had been shipped by air and not vessel, and asked that ABIG contact National Commercial Bank to change the conditions of the letter of credit. **(R. 80 Uwaydah Opposition to Motion for Summary Judgment.)** On November 18, 2001 Alex McFarlane sent a second communication to ABIG that the CT Scanner would be delivered within 48 hours of confirmation that Prometheus had received the funds from the Letter of Credit. **(R. 66 GEMS' Motion For Summary Judgment.)**

On November 22, 2001 Uwaydah communicated to Alex McFarlane of GEMS not to deliver the CT Scanner to the site, until Prometheus had confirmation of the release of funds under the letter of credit. **(R. 80 Uwaydah Opposition to Motion for Summary Judgment.)**

On November 27, 2001 the funds from the letter of credit were received by Prometheus. On November 29, 2001 Prometheus transferred the funds from the letter of credit from its account in the United States, to its account in Beirut,

Lebanon. **(Plaintiff's Motion for Summary Judgment.)** According to the sales contract between GEMS and Prometheus, the contract was to be paid through a bank in France acceptable to GEMS. **(Prometheus' Motion to Dismiss.)**

On December 5, 2001 Prometheus sent a letter to GEMS that it would not accept the CT Scanner because GEMS made representations to Al-Banader that they would be the title holder of the CT Scanner, and further Prometheus demanded return of the $107,000 down payment. **(R. 80 Uwaydah Opposition to Motion for Summary Judgment.)**

On or about December 5, 2001 GEMS released the CT Scanner to ABIG. **(R. 66 GEMS' Motion for Summary Judgment.)**

On December 6, 2001 GEMS refused to accept rescission of the contract, because GEMS had already delivered the CT Scanner to ABIG. In part of the response, the equipment was released to ABIG, because of "increasingly hostile threats from His Excellency, Prince Turki Al-Banadar."**(R. 66 GEMS' Motion for Summary Judgment**.)

On December 10, 2001 Prometheus responded, stating again that the CT Scanner was to be titled to Prometheus and not ABIG, in response to GEMS' December 6, 2001 letter. **(R. 66 GEMS' Motion for Summary Judgment**.)

C. The Decisions Below

The district court granted GEMS' motion for summary judgment, against Uwaydah, finding Uwaydah liable for breach of contract as the alter-ego of Prometheus, conversion and fraud. The district court's reasoning for granting

summary judgment was based on the sanction order issued by the district court. No judgment was issued against Prometheus, because at the time of the summary judgment decision, the proceeding as against Prometheus was stayed as a result of its bankruptcy filing. The opinion of the court of appeals found Prometheus' bank records show that the LOC funds posted on November 27 and were wired to someone in Beirut, Lebanon, on November 29, which was at least a week before the alleged breach. Thus a valid inference can be drawn that Uwaydah had no intention of paying for the scanner at any point. Such an inference, while not the strongest, nonetheless went unrebutted by Uwaydah's summary judgment submissions to the court below or in his brief to this court." **(Court of Appeals Opinion, App. B, P. 3a.)** The opinion of the court of appeals relies on this fact to affirm the summary judgment decision on the fraud allegation. The court of appeals completely misinterprets the facts resulting in a plain error. The transfer to Beirut, as shown in the bank records was to an account of Prometheus in Beirut, Lebanon. This transfer was a transfer from one Prometheus account to another Prometheus account. **(Motion for Summary Judgment.)** Further, this was shown in GEMS' Motion for Summary Judgment. Therefore, Uwaydah had no reason to rebut this allegation.

The court of appeals affirmed the decision of the district court, but reasoned that because the funds transfer between Prometheus' and "somebody in Beirut, Lebanon" was evidence of intent to defraud, the district court properly granted the motion for summary judgment.

REASONS FOR GRANTING THE PETITION

I. IT IS AN ABUSE OF DISCRETION TO DENY A MOTION UNDER FEDERAL CIVIL RULE 60(b) TO RELIEVE A PETITIONER OF A SANCTION ORDER THAT WAS A RESULT OF ATTORNEY MISCONDUCT.

The district court in this matter issued a sanction against Uwaydah that was a direct result of the actions of his counsel not responding to requests to take Uwaydah's deposition.

Uwaydah upon learning of the sanction order, obtained new counsel and filed a motion under F. R. CIV. P. 60(b) for relief from the sanction order. The district court denied the motion for relief from the sanction order, then granted summary judgment in favor of GEMS, based upon the sanction order.

In cases where the party is sanctioned for an attorney's derelictions, this court has ruled that the client is bound by the acts of his attorney, and can not avoid the consequences of the acts or omissions of this freely selected agent. *Link v. Wabash R.R.* 370 U.S. 626; 8 L. Ed. 2d 734 (1962).

The *Link* decision did not consider the question of whether it is an abuse of discretion to deny a motion made under Federal Civil Procedure Rule 60(b) to relieve a party from a final judgment for inadvertence or excusable neglect, when the judgment was the result of attorney misconduct and not that of the party themselves. In the *Link* decision, no such motion was filed. *Id., at* 636.

In this case, a motion under Federal Civil Rule 60(b) was made upon the discovery of the sanction order, which

included a statement from Uwaydah and an affidavit of his business attorney Mark Weiss. **Motion for Relief from Judgment**.

Despite this Court's decision in *Link*, the several circuit courts have been reluctant to uphold extremely harsh sanctions merely to discipline an attorney. *Buck v. United States Dep't of Agric.*, 960 F.2d 603 (6th Cir. 1992); *Oritiz-Anglada v. Oritiz-Perez*, 183 F.3d 65 (1st Cir. 1999). The Sixth Circuit has found that dismissal of an action is a harsh sanction for an attorney's action and should only be ordered in extreme situations showing 'a clear record of delay or contumacious conduct by the Plaintiff.' *Carter v. City of Memphis, Tenn.* 636 F.2d 159 (6th Cir. 1980). This is consistent with the courts' priority to try matters based upon the merits.

In this matter, the renewed motion for sanctions and a motion for summary judgment were filed on the same day. The district court granted the motion for summary judgment, based on the sanction order preventing Uwaydah from presenting any evidence contrary to the allegations of GEMS. The result of the sanction order is a *de facto* default judgment against Uwaydah.

Upon review, the Sixth Circuit Court of Appeals did not review the abuse of discretion, finding that it was moot. The court of appeals ruled GEMS was entitled to judgment based upon the motions and evidence in the brief in opposition filed in this case. The Sixth Circuit's factual determinations, however was contrary to the facts contained in GEMS' motion for summary judgment.

In this case, the district court granted GEMS' judgment in an amount which is nearly one million dollars, based on the

fact that Uwaydah's counsel failed to agree on a date for deposition of Uwaydah. The court further based the sanction order, on failure to comply with previous orders issued by the court, which were issued while a bankruptcy stay existed, and were void.[3]

"The fundamental requirements of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Link at 632, quoting Anderson National Bank v. Luckett,* 321 U.S. 233 (1944). "In addition, the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b) ... renders the lack of notice of less consequence." *Link at 632.*

Uwaydah was not provided notice of the sanction proceedings by his counsel. In fact, the first time Uwaydah was aware that GEMS was seeking to take his deposition was after the sanction order was issued. The district court was made aware, both by letter sent by Uwaydah directly to the court, and by the motion under Federal Rule of Civil Procedure 60(b), that Uwaydah had no notice of the proceedings, however instead denied him recourse. Uwaydah sought to avail himself of the escape hatch provided under Rule 60(b), but was denied.

In addition the court of appeals, choose not to consider whether this constitutes an abuse of discretion, but instead decides the summary judgment issue *de novo,* resulting in a decision contrary to the clear factual record. Again Uwaydah

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[3] The issuance of and reliance upon orders while a stay exists under 11 U.S.C.S. § 362, is discussed in detail in Section II.

sought to relieve the harsh result, by filing a motion to reconsider the decision and was denied.

The denial of the motion made under Federal Rule of Civil Procedure 60(b) constituted an abuse of discretion and a denial of due process under the Fifth Amendment to The United States Constitution.

II. THE COURT'S RELIANCE ON PREVIOUS ORDERS, ISSUED DURING A STAY UNDER 11 U.S.C.S. § 362, IS A PER SE ABUSE OF DISCRETION

11 U.S.C.S. Section 362 states in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under sections 301, 302, or 303 of this title ... operates as a stay applicable to all entities, of –
>
> (1) the commencement or continuation, including the issuance of process or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

Actions taken in violation of the automatic stay are invalid and voidable and shall be void absent limited equitable circumstances. *Easley v. Pettibone Michigan Corp.*, 990 F.3d 969 (6th Cir. 1993). The purpose of the stay provision is to give a debtor a "breathing spell" and stops all collection efforts, all harassment and all foreclosure actions. *Javens v.*

City of Hazel Park 108 F.3d 359 (6th Cir. 1997). A creditor that violates the automatic stay has an affirmative duty to undo the offending acts even if he had no actual notice of the bankruptcy at the time the acts were performed. *Matter of Hellums*, 772 F.2d 379 (7th Cir. 1985).

Uwaydah filed his bankruptcy petition on January 14, 2003. The district court, and GEMS, with full knowledge that the stay existed, ordered initial disclosures on January 31, 2003, issued a show cause order against Franz Ward and Uwaydah to its file to the court in response to a subpoena. All of these "abuses" were relied upon by GEMS in its renewed motion for sanctions, and the district court in granting the motion.

The purpose of the automatic stay is to provide the debtor protection from creditors continuing to pursue collection effort. *Javens v. City of Hazel Park* 108 F.3d 359 (6th Cir. 1997). The District Court allowed GEMS to continue its collection effort by ordering the turn over of the file to the Court by Uwaydah's former attorneys and ordering the show cause against Uwaydah. The first order to show cause and order to make disclosures under rule 26 were void, because they were issued in violation of the automatic stay.

On June 11, 2003 GEMS filed a stipulation to lift the stay and proceed with the case in the District Court. On October 31, 2003 the District Court affirmed its previous (void) order for Uwaydah to make Rule 26 disclosures. On November 4, 2003 Uwaydah produced the information required under the Rule 26 disclosure order of October 31, 2003.

On November 11, 2003, GEMS filed it motion for contempt and renewed motion for sanctions. On November 17, 2003 Uwaydah filed a response, stating that the

information sought in the initial disclosures was produced. The District Court terminated this second motion finding that Uwaydah was participating in discovery.

The district court's reliance upon the void orders, issued in violation of the automatic stay provision of 11 U.S.C.S. § 362 constitutes a per se abuse of discretion. The court of appeals failed to consider the arguments, based on its finding that GEMS was entitled to summary judgment.

The purpose of the automatic stay is to prevent creditors from continuing collection efforts. To allow a district court to ignore the plain meaning and the spirit of the automatic stay and continue to issue orders in furtherance of collection efforts amounts to a per se abuse of discretion. Any order that is issued in furtherance of a collection effort that violates the automatic stay is void. Reliance on the order, later in the proceeding as a basis for sanctions, requires the later order to be void as well.

III. THE FORUM SELECTION CLAUSE REQUIRED THE DISTRICT COURT TO DISMISS THE CASE.

The Standard Terms and Conditions of Export Sale was part of the agreement between GEMS and Prometheus. Under the Standard Terms and Conditions, the contract was to be interpreted under the law of France. The Standard Terms and Conditions further required any disputes to be resolved in the Paris courts. **(R. 5 Prometheus' Motion to Dismiss.)** This provision was contained within GEMS contract, chosen by GEMS, and was the location where GEMS was primarily located.

A forum selection clause in an international agreement should control absent a strong showing that it should be set aside. This Court emphasized the importance of upholding forum selection and choice of law clauses in international contacts. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). This court ruled "absent some compelling and countervailing reason, it should be honored by the parties and enforced by the courts." *Id.*

GEMS filed this action in the United States District Court for the Northern District of Ohio, against Uwaydah and Prometheus. The claim of GEMS was that Uwaydah was the alter-ego of Prometheus and therefore liable under the contract. Prometheus moved to dismiss this action, based upon the forum selection clause contained within the contract. **(Prometheus' Motion to Dismiss.)** The district court denied the motion.

The reasoning of this court's decision in *Bremen* holds true more today than ever before. The United States economy has truly shifted to a global economy, and as such U.S. Courts need to recognize and honor the choice of law provisions to allow the contracting parties choose the jurisdiction to resolve disputes. Courts can not have trade and commerce in world markets and international waters exclusively decided by United States Courts. In this case the parties contracted to have the dispute decided by French Courts. GEMS specifically required this as part of its contract, and GEMS was a French Corporation. The sole purpose of choosing to bring this action in a U.S. Court was to gain a strategic advantage. This court ruled it must be "unreasonable" under the circumstances to require a resisting party to litigate the action within the chosen forum. In this matter it was unreasonable to allow this matter to proceed in a U.S. Court.

GEMS had numerous delays in delivery on this contract, including delays they attribute to the events of September 11, 2001. GEMS assumed such an excuse in failure to deliver would be better accepted in a U.S. Court, than in a French Court. There was no logical or reasonable explanation for the district court not to enforce the forum selection clause.

The court of appeals did not address this issue in its opinion.

IV. A CLAIM UNDER AN ALTER-EGO THEORY OF LIABILITY, BELONGS TO THE BANKRUPTCY DEBTOR-CORPORATION NOT THE INDIVIDUAL CREDITORS

Prometheus was a Delaware Corporation at all relevant times in this case. On November 24, 2004 Prometheus filed a chapter 7 Bankruptcy in the United States Bankruptcy Court for the Central District of California, LA being case no. LA 04-33283. **(R. 66 Motion for Summary Judgment.)**

There arises an issue whether an alter ego claim belongs to a specific creditor or the corporation, when the corporation has filed a bankruptcy. This was discussed in the Sixth Circuit's decision in *In re RCS Engineered Products Company, Inc., v. Spartan Tube and Steel, Inc.*, 102 F.3d 223 (6th 1996) whether an alter ego claim can be brought by a subsidiary against a parent corporation. In the *RCS Engineered* decision, the Sixth Circuit determined that whether an alter ego claim is property of the estate of the bankrupt debtor is a matter of state law. The *RCS Engineered Products* ruling decided under Michigan law that an alter ego claim is not part of the estate of the debtor. The District Court in this case, determined that Ohio law applied to the alter ego

claim.[4] The Second Circuit Court of Appeal has stated that under Ohio law, an alter ego claim may be asserted by the debtor corporation, and therefore is property of the estate. *In re Lee Way Holding Co., v. Banner Industries, Inc.*, 105 B.R. 404 (1989); *St. Paul Fire and Marine Insurance Co., v. Pepsico, Inc.*, 884 F.2d 688 (1989).

In this case, Prometheus filed bankruptcy on November 24, 2004. As a result of that Bankruptcy filing, all claims which may belong to Prometheus are property of the bankruptcy estate of Prometheus at the time of filing. Under Ohio law, the claim of alter ego against Dr. Uwaydah is a claim that would belong to Prometheus and therefore property its bankruptcy estate. 11 U.S.C.S. § 541. Under Section 362(a)(3) all creditors as of commencement of the case are stayed from "any act to obtain possession of property of the estate or of property from the estate, or to exercise control over property of the estate."

This court addressed a similar issue in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972) wherein this court determined under the Bankruptcy act of 1898 a reorganization trustee lacked standing to sue the indenture trustee because Congress had not indicated such an intention within the act.

This matter is under the bankruptcy code as it existed in 2004, and involves an issue of whether an alter-ego claim

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[4] The Court never specifically addressed the state law that applied, however it used the standard of the Ohio Supreme Court in *Belvedere Condominium Unit Owners Assoc. v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274 (1993).

belongs to an individual creditor, or is property of the estate, pursuant to 11 U.S.C.S. § 541.

Several court of appeals have issued opinions on the issue including the Ninth Circuit in *Williams v. California 1st Bank* 859 F.2d 664 (9th Cir. 1988); the Second Circuit in *Kalb, Voorhis & Co., v. American Finance Corp.* 8 F.3d 130 (2nd Cir. 1993); and the Fifth Circuit in *In re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987).

In each of these cases, the circuits determined that the issue is governed under state law, and is based on whether under state law a corporation may pierce its own corporate veil. The issue then becomes whether the federal choice of law rules, or the forum state choice of law rules apply as to which state law applies. There is a split in the circuits as to this issue, *see Blanco v. Erkins (In re Gaston & Snow)* 243 F.3d 599. Prometheus was a Delaware Corporation, who filed bankruptcy in California, involved in litigation in Ohio. The district court in Ohio, applied Ohio law as to whether the alter-ego claim belonged to the bankruptcy estate of Prometheus or GEMS.

The Ohio Court applied Ohio law in making the determination that GEMS could pierce the veil on the alter-ego claim and recover against Uwaydah. Even with the choice of law provisions, Ohio law should not have been used as the standard. Prometheus was not an Ohio corporation.

V. A COURT OF APPEAL IS BOUND BY THE RECORD, IN DECIDING ISSUES ON SUMMARY JUDGMENT

The court of appeal in this case found that all of the above matters are moot, and awarded judgment as a matter of law on the issue of fraud.

The District Court decision states:

> In reliance on Dr. Uwaydah's promise that GEMS would be paid in full upon delivery of the CT Scanner to ABIG in Saudi Arabia, which was made on behalf of Prometheus, GEMS shipped the CT Scanner. Prometheus, however, has failed to pay the remaining $963,000 balance of the contract price. Accordingly, and because Prometheus is Dr. Uwaydah's alter ego, GEMS is entitled to summary judgment for fraud against Dr. Uwaydah based on his misrepresentations to GEMS, which has caused GEMS to suffer $963,000 in damages.

The promise was part of the contract between Prometheus and GEMS. The contract entered into for the purchase of a CT Scanner required Prometheus to pay the remaining amount due upon delivery of the CT Scanner.[5]

Under Ohio law, it is not a tort to breach a contract, regardless of the motive. *Ketcham v. Miller* 104 Ohio St. 372 (1922). Ohio Common-law fraud requires proof of the following elements: "(a) a representation or, where there is a

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[5] The delivery of the CT Scanner was to be to Prometheus, not ABIG and title was to be in the name of Prometheus.

duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Russ v. TRW, Inc.* (1991), 59 Ohio St. 3d 42, 49, 570 N.E.2d 1076; *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69.

A claim for fraud cannot be predicated upon promises or representations relating to future actions or conduct. *Martin v. The Ohio State University Foundation* 139 Ohio App. 3d 89, 742 N.E.2d 1198 (2000). The exception to this rule is when the person who makes his promise of future action, occurrence, or conduct, and who at the time he makes it has no intention of keeping his promise. In such case, the requisite misrepresentation of an existing fact is said to be found in the lie as to his existing mental attitude and present intent. *Tibbs v. National Hom Const. Corp.* 52 Ohio App. 281; 369 N.E. 2d 1218 (1977).

The Sixth Circuit, reviewing the facts *de novo* found "Here, GEMS cites the fact that Uwaydah made repeated assurances that Prometheus would pay for the scanner if GEMS shipped it to Saudi Arabia, but then immediately diverted the funds away from Prometheus right after the funds posted to the account, thus rendering Prometheus insolvent." **(Sixth Cir. Opinion, P. 4-5, App. B, 3a.** The Sixth Circuit Opinion went on to find "Prometheus's Bank records show that the LOC funds posted on November 27 and were wired to someone in Beirut, Lebanon, on November 29, which was at least a week before the alleged breach." **(Sixth Cir. Opinion, P. 4-5, App. B, 3a.)**

The bank records the court of appeals was referring to are attached to GEMS' motion for summary judgment. It shows that on November 29, 2001 a wire transfer was sent from Prometheus to Blominvest Bank in Beirut, Lebanon, for the benefit of Prometheus. The next page of the records show the balance for the account in Blominvest Bank in Beirut, Lebanon for Prometheus Health Imaging Inc., was $1,220,872.50. The Sixth Circuit obviously did not review the evidence that the presented by GEMS in making its decision. The Court then states that this "inference" of fraud was never disputed by Uwaydah in the Court below.

This Court has set forth the standard under Federal Civil Procedure Rule 56 in the decision of *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548 (1986). *Celotex* makes clear that the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of genuine issue of fact on a material element of the nonmoving party's claim. The non-moving party then has the responsibility of responding to the factual allegations, and showing a material issue of fact in dispute.

In this matter, the moving party identified the portion of the record, which showed the wire transfer on November 29, 2001 went from Prometheus' account in the United States to Prometheus' account in Beirut, Lebanon. A **(Plaintiff's Motion for Summary Judgment, Exhibit F and G.)** The documents are reproduced as Appendix E, 24a.

The Sixth Circuit then found facts, contrary to the record as presented by the moving party, and record demonstrated by the moving party, and ruled those facts were not contradicted by Uwaydah. Under the *Celotex* standard, the non-moving

party only has a duty to dispute facts once they are established by the moving party and the record. In this case, the facts found by the Sixth Circuit were not supported by the record.

The Sixth Circuit simply invented facts to grant summary judgment in favor of GEMS. Uwaydah filed a timely petition for rehearing on this very issue, which the Sixth Circuit denied.

CONCLUSION

This Court should grant Petitioners Motion for Certiorari.

Respectfully submitted

McFADDEN & FREEBURG CO., L.PA.
David A. Freeburg (Ohio S.Ct. #0071054)
* *Counsel of Record*
1370 Ontario Street
Suite 1700
Cleveland, Ohio 44113
(216) 622-0850
Facsimile: (216) 622-0854
Email: freeburg@mcfaddenlaw.us

Attorney for Petitioner
Dr. Munir Uwaydah

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No.05-4163

[Filed January 26, 2007]

GENERAL ELECTRIC MEDICAL SYSTEMS EUROPE, INC.,
Plaintiff-Appellee,

v.

PROMETHEUS HEALTH IMAGING, INC.,
Defendant,

DR. MUNIR UWAYDAH,
Defendant-Appellant.

JUDGES: Before: SILER, McKEAGUE, and GRIFFIN, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed by the appellant,

it is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No.05-4163

[Filed November 22, 2006]

GENERAL ELECTRIC MEDICAL SYSTEMS EUROPE, INC.,
Plaintiff-Appellee,

v.

PROMETHEUS HEALTH IMAGING, INC., and DR. MUNIR UWAYDAH,
Defendants-Appellants.

JUDGES: Before: SILER, McKEAGUE, and GRIFFIN, Circuit Judges.

OPINION

PER CURIAM. Defendants Prometheus Health Imaging, Inc. ("Prometheus") and Dr. Munir Uwaydah, a Prometheus principal, appeal the grant of summary judgment in favor of Plaintiff General Electric Medical Systems Europe ("GEMS") for breach of contract, fraud, and conversion. For the reasons set forth below, we AFFIRM the judgment finding Uwaydah

personally liable for fraud. Because GEMS seeks the same remedy in its breach of contract and conversion claims as it does under its fraud theory, the claims are moot.

I.

In 2001, Prometheus and Al Bandar International Group ("ABIG"), a third party, organized under the laws of Saudi Arabia, entered into a joint venture to establish a medical imaging center in Riyadh. The agreement required Prometheus to procure a CT scanner to be utilized by ABIG in Riyadh, and Prometheus would perform imaging analysis services in the United States. Prometheus contracted to buy a scanner from GEMS for $1,070,000 with a 10% down payment, 50% due at shipment, 30% due at delivery, and the rest due upon complete installation.

ABIG executed a letter-of-credit ("LOC") in the amount of $1,000,000 naming Prometheus as beneficiary. ABIG initially released $200,000 of the funds from the LOC, and Prometheus used $107,000 to make the down payment required by the contract. The release of the balance of funds under the LOC was contingent upon GEMS's satisfaction of Saudi Arabian import and shipping documentation requirements.

Several circumstances, including the events of September 11, 2001, delayed GEMS's compliance with the contract and GEMS failed to properly execute certain documents. Once the issues were resolved, Prometheus agreed that if ABIG found the documentation satisfactory and released the LOC funds, GEMS would be paid in full; GEMS also waived its 50% payment due upon shipment of the scanner. Once the scanner finally arrived in Saudi Arabia in late November 2001, Uwaydah informed GEMS that the LOC funds had been

released (implying satisfaction of the documentation and delivery requirements), and as soon as he verified the funds' receipt, he would instruct GEMS to deliver the scanner and would remit payment. However, by early December, Uwaydah had not called and ABIG's representatives confronted GEMS at its warehouse in Riyadh, produced documents showing that the funds had been released, and made "increasingly hostile threats" demanding delivery. GEMS complied and delivered the scanner. A week later, Uwaydah repudiated the contract with GEMS, claiming GEMS "made representations to [ABIG] that they are title holder of the unit" and that GEMS breached the agreement because the contract specified that Prometheus was the "buyer" and "end user."

In September 2002, GEMS sued numerous defendants, including Prometheus and Uwaydah, individually, seeking damages from Prometheus for breach of contract and from Uwaydah personally as Prometheus's alter ego and under fraud and conversion theories. In January 2003 Uwaydah filed a voluntary bankruptcy petition in the Central District of California which stayed the proceedings against him. GEMS's counsel learned of the bankruptcy filing via the notice sent to creditors and potential creditors on or about January 27, 2003. The district court stayed proceedings in May, after it was finally given notice of the bankruptcy stay, but only after numerous discovery orders had already gone unheeded. Uwaydah and GEMS entered into a stipulation to lift the stay sometime thereafter and proceeded with the case in Ohio.

In November 2004, GEMS moved for sanctions for the third time -- the first two having been denied by the district court -- on the basis of delay caused by Uwaydah's unresponsiveness to discovery requests and orders and his intransigence with respect to scheduling a deposition. GEMS

also moved for summary judgment. Uwaydah noticed GEMS and the court that Prometheus had gone into bankruptcy, and that all ongoing litigation involving it was automatically stayed. In January 2005, Uwaydah responded to the motions. In May, the district court ordered sanctions against Uwaydah, prohibiting him from "introducing any testimony contrary to the facts set forth by GEMS." In August, the district court entered summary judgment against Uwaydah personally as Prometheus's alter-ego and for fraud and conversion. The court awarded GEMS the balance of the price of the scanner plus interest.

II.

A.

We turn first to GEMS's fraud claim.[1] The elements of fraud in Ohio are: "(a) a representation ... (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 514 N.E.2d 709, 712 (Ohio 1987) (citation

[1] While normally we would address the sanctions question first, because our decision rests on the summary judgment record before the district court which was submitted prior to imposition of the sanctions, the sanctions question is moot. *See Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 403 n.2 (6th Cir. 1999) (finding as moot any issue "not necessary to resolution of [the] case.").

omitted). Where a claim of fraud is predicated upon a promise or representation relating to future action, the plaintiff must prove that at the time he made it, the promisor had no intention of keeping the promise. *See Tibbs v. Nat'l Home Constr. Corp.*, 52 Ohio App. 2d 281, 369 N.E.2d 1218, 1223 (Ohio App. 1977). Ohio has made clear that neither the fact of breach, nor proof of malice or bad faith, is sufficient to infer the requisite intent. *See Canderm Pharmacal, Ltd. v. Elder Pharms., Inc.*, 862 F.2d 597, 602 (6th Cir. 1988) (citation omitted).

Here, GEMS cites the fact that Uwaydah made repeated assurances that Prometheus would pay for the scanner if GEMS shipped it to Saudi Arabia, but then immediately diverted all funds away from Prometheus right after the funds posted to the account, thus rendering Prometheus insolvent. Uwaydah contends that because GEMS breached the contract, Prometheus was relieved of its duty to pay and he was therefore free to use the funds for other purposes. However, Uwaydah's theory is incorrect on its face because it does not prove GEMS materially breached the contract, which is the only way payment thereunder would have been excused. *See Kersh v. Montgomery Developmental Ctr.*, 35 Ohio App. 3d 61, 519 N.E.2d 665, 668 (Ohio Ct. App. 1987).

The contract obligated GEMS to deliver the scanner to ABIG in Riyadh and comply with the LOC's requirements, both of which it accomplished. Uwaydah does not prove how passage of title was essential to the purpose of the agreement in order to claim material breach. *See Id.* Moreover, Uwaydah's justification is belied by the facts. GEMS delivered the scanner to ABIG in early December, which is when Uwaydah alleges GEMS breached the contract by passing title. However, Prometheus's bank records show that the LOC funds posted on November 27 and were wired to

someone in Beirut, Lebanon, on November 29, which was at least a week before the alleged breach. Thus, a valid inference can be drawn that Uwaydah had no intention of paying for the scanner at any point. Such an inference, while not the strongest, nonetheless went unrebutted by Uwaydah's summary judgment submissions to the court below or in his brief to this court.

We therefore affirm summary judgment on the fraud issue against Uwaydah personally.

B.

Because GEMS sought the same remedy we affirm herein through its claims for alter ego/breach of contract and conversion, those issues are moot. *See Mount Elliott*, 171 F.3d at 403 n.2 (finding as moot any issue "not necessary to resolution of [the] case.").

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02cv1844

[Filed August 5, 2005]

GENERAL ELECTRIC MEDICAL SYSTEMS EUROPE, INC.,
Plaintiff,

v.

PROMETHEUS HEALTH IMAGING, INC., et al.,
Defendants.

JUDGE KATHLEEN O'MALLEY

ORDER

This matter arises on Plaintiff General Electric Systems Europe's ("GEMS") *Motion for Summary Judgment Against Defendant Dr. Munir Uwaydah* (Doc. 66) ("Motion for Summary Judgment"). GEMS seeks summary judgment against Dr. Uwaydah on Count 1 (Breach of Contract), Count

4 (Alter Ego), Count 5 (Conversion) and Count 6 (Fraud).[1] For the reasons outlined below, GEMS' Motion for Summary Judgment against Dr. Uwaydah as to these counts is **GRANTED**.

I. BACKGROUND

The Court's abbreviated discussion below is compelled by Dr. Uwaydah's dilatory conduct during the pendency of this case. In that regard, a brief summation of the procedural history of this case, as it relates to the various motions and orders regarding sanctions against Dr. Uwaydah, is warranted.

Due to his continued abuse of the discovery process and violation of specific orders of this Court with respect to discovery, GEMS sought sanctions informally against Dr. Uwaydah on June 23, 2003 (Doc. 42). When he continued to abuse the discovery process, GEMS later formally sought sanctions in its *Motion for Contempt and Renewed Motion for Sanctions* (Doc. 53) on November 11, 2003 against Dr. Uwaydah and Prometheus. After repeated conferences with the parties in an effort to convince the Defendants to comply with the Court's earlier discovery orders, the Court terminated that motion on August 8, 2004 (Doc. 63), but noted that GEMS' requests for sanctions could be re-filed if discovery abuses continued. Ultimately, that is exactly what happened and GEMS again sought sanctions against Dr. Uwaydah.

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[1] GEMS' motion is limited to Dr. Uwaydah because Defendant Prometheus Health Imaging, Inc. ("Prometheus") is currently in bankruptcy. Under its *alter ego* theory, GEMS argues that Dr. Uwaydah is liable for all damages sought by GEMS in any event.

On November 22, 2004, GEMS filed its *Renewed Motion for Sanctions and Memorandum in Support* (Doc. 65) against Dr. Uwaydah, in which it argued that he should be sanctioned for his failure to comply with his Rule 26 discovery obligations and his refusal to make himself available for deposition. GEMSrequested that the Court enter default judgment against Dr. Uwaydah, or, in the alternative, preclude him from introducing testimony contrary to the facts as set forth by GEMS. As outlined in the Court's order granting in part GEMS' motion, and based on the series of sanctions motions that had been filed earlier in the case but terminated by the Court in an effort to give Dr. Uwaydah every reasonable opportunity to comply with discovery, the Court sanctioned Dr. Uwaydah by prohibiting him from introducing testimony contrary to the facts as set forth by GEMS. *See* Doc. 84. This sanction bears heavily on the instant Motion for Summary Judgment because the facts, as alleged by GEMS, cannot now be disputed by Dr. Uwaydah.

II. DISCUSSION

A. Legal Standard.

GEMS seeks summary judgment pursuant to Federal Rule of Civil Procedure 56. Rule 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

B. Summary Judgment in Favor of GEMS is Warranted.

Here, no genuine issues of material fact exist. In light of the Court's sanction prohibiting Dr. Uwaydah from

introducing testimony contrary to the facts as set forth by GEMS, the Court makes the following factual findings:[2]

- Prometheus agreed to buy, and GEMS agreed to sell, a Light Speed Plus CT-Full Body Scanner ("CT Scanner") for use by Prometheus and its joint venture partner, Al-Banader International Group ("ABIG"), located in Riyadh, Saudi Arabia;

- Prometheus and GEMS entered into a contract for the sale of the CT Scanner; the contract price was $1,070,000;

- Pursuant to the contract, Prometheus agreed to pay a 10% down payment by September 27, 2001 (i.e., $107,000), 50% of the contract price upon shipment, 30% of the contract price upon delivery, and 10% of the contract price upon acceptance and installation;

- In September 2001, ABIG released $200,000 to Prometheus from a letter of credit that had been established for the express purpose of paying for the CT Scanner;[3]

- On September 27, 2001, and pursuant to the contract, Prometheus paid to GEMS $107,000 (i.e., the 10% down payment) from the $200,000 that was released from the letter of credit – the remaining $93,000 was allocated to

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[2] The Court previously summarized this case in its sanctions order. In so far as a lengthy summary of the facts is not crucial to the Court's analysis of the present motion, the Court simply incorporates by reference its prior summary. *See* Doc. 84.

[3] The letter of credit had an available credit line of $1,000,000.

"business expenses," with $20,000 of that sum going to Dr. Uwaydah personally;

- The parties later modified the contract to omit the requirement that 50% of the total contract price to be paid on shipment, agreeing instead to payment in full on delivery of the CT Scanner;

- GEMS relied on Dr. Uwaydah's promise that it would receive payment in full on delivery of the CT Scanner when it agreed to modify the timing component of the contract's payment term to "on delivery" instead of "on shipment";

- The CT Scanner was shipped on or about November 6, 2001 to Riyadh, Saudi Arabia;

- On November 27, 2001, ABIG released the remaining $800,000 of the letter of credit to Prometheus;

- Unbeknownst to GEMS at the time, on November 29, 2001, Prometheus transferred the recently released $800,000 out of the United States, transfers that included a $50,000 wire transfer to Dr. Uwaydah personally;

- On or about December 5, 2001, GEMS released the CT Scanner to ABIG because ABIG provided evidence that the remaining funds from the letter of credit had been released to Prometheus;

- Prometheus failed to pay, and has continued to fail to pay, to GEMS the remaining $963,000 balance for the CT Scanner (i.e., $1,070,000 minus the $107,000 down payment);

- Dr. Uwaydah was the President and a shareholder of Prometheus;

- Dr. Uwaydah was one of only two acting directors of Prometheus;

- Dr. Uwaydah held himself out to GEMS as being personally liable for Prometheus's debts;

- Dr. Uwaydah had complete dominion and control over Prometheus's accounts and was solely responsible for executing and authorizing wire transfers for Prometheus, which he authorized for his personal benefit;

- Prometheus was undercapitalized from its inception;

- Prometheus failed adequately to observe corporate formalities or keep corporate records; and

- Dr. Uwaydah used Prometheus to defraud GEMS and to convert money and properties belonging to GEMS.

Based on the foregoing undisputed factual determinations,[4] the Court makes the following legal findings relative to GEMS' individual claims at issue in the instant motion for summary judgment.

Count 1 – Breach of Contract

It is undisputed that a contract existed between GEMS and Prometheus for the sale of a CT Scanner. Likewise, there is no dispute that GEMS performed its obligations under that contract. GEMS delivered the CT Scanner to Prometheus (*via* delivery to ABIG, the designated consignee) pursuant to the terms of the contract. Because Dr. Uwaydah caused Prometheus to fail to pay the balance on the account (i.e., 90% of the contract price, or $963,000), Prometheus breached its contract with GEMS. Pursuant to the Court'sdetermination *infra* that Dr. Uwaydah is the *alter ego* of Prometheus, and therefore personally liable for its debts, summary judgment against Dr. Uwaydah on GEMS' breach of contract claim is warranted.

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[4] While the Court has prohibited Dr. Uwaydah from contesting the facts put forth by GEMS, it would be justified in making these same findings of fact even in the absence of that sanction. The Court has reviewed Dr. Uwaydah's opposition to GEMS' Motion for Summary Judgment. While he makes a number of arguments and assertions in that opposition, none are supported by evidence in the record and most are largely irrelevant. For instance, while Dr. Uwaydah makes much out of the fact that, as of November 22, 2001, Prometheus was unable to confirm that ABIG had released the funds under the letter of credit and, thus, told GEMS not to deliver the CT Scanner, he cannot deny that as of November 29, 2001 (well before delivery occurred), the funds were in – and ultimately transferred out of – Prometheus's account, making the events of November 22, 2001 irrelevant.

Accordingly, Dr. Uwaydah is liable for Prometheus's breach of its contract with GEMS and judgment for $963,000 against him and in favor of GEMS is warranted.

Count 4 – Alter Ego

As articulated by the Supreme Court of Ohio in *Belvedere Condominium Unit Owners Assoc. v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274, 289 (1993), Ohio law applies a three-prong test in determining whether a plaintiff may pierce the corporate veil and hold individual shareholders liable. In sum, the corporate form may be disregarded, and individual shareholders held liable for corporate misdeeds, when: 1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own; 2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and 3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id.*

Based on the Court's factual findings relative to Prometheus's corporate form deficiencies, the degree of control Dr. Uwaydah exercised over Prometheus and Dr. Uwaydah's use of Prometheus to engage in tortious conduct *vis-a-vis* GEMS, the Court finds that Prometheus is Dr. Uwaydah's *alter ego*. As such, GEMS can pierce Prometheus's corporate veil such that Dr. Uwaydah is liable for Prometheus's debts and obligations to GEMS.

Count 5 – Conversion

The elements of conversion under Ohio law are that: 1) the plaintiff had ownership or right to possession of the property at the time of the conversion; 2) the defendant

converted the property by a wrongful act or disposition of the plaintiff's property rights; and 3) damages. *NPF IV v. Transitional Health Services*, 922 F. Supp. 77, 81 (S.D. Ohio 1996) (articulating Ohio law on conversion). Money can be the subject of conversion. *Id.* As to the second element, if the object of conversion (i.e., money, in this case) has been lawfully acquired by the defendant, the rightful owner (i.e., the plaintiff) must demand possession of the object before a claim for conversion arises. *Id.*

Here, Prometheus lawfully acquired from ABIG funds totaling $1,000,000 pursuant to the letter of credit, which had been established for the sole purpose of paying for the CT Scanner provided by GEMS. Accordingly, so long as it performed under the contract, GEMS had a legal right to the funds released from the letter of credit. Once GEMS demanded that money from Prometheus, which it did several times after delivering the CT Scanner, Prometheus's failure to pay that money to GEMS constituted conversion of the money. Because GEMS received $107,000 (i.e., the 10% down payment that came from the letter of credit), only the remaining $893,000 of the $1,000,000 letter of credit could be converted, as opposed to the entire $1,070,00 contract price for the CT Scanner. Accordingly, as to the conversion claim, GEMS admittedly could only recover a maximum of $893,000.

Of the $1,000,000 in funds that was transferred from the letter of credit from ABIG to Prometheus (*via* two separate transfers), $70,000 was directly transferred to Dr. Uwaydah (i.e., $20,000 from the initial $200,000 transfer, and $50,000 from the subsequent $800,000 transfer). Accordingly, Dr. Uwaydah is *directly* liable for the conversion of $70,000. Dr. Uwaydah is *indirectly* liable pursuant to the alter ego doctrine

(Count 4) for the entire $893,000 converted from the letter of credit by Prometheus.

Accordingly, Dr. Uwaydah is liable for conversion and judgment for $893,000 against Dr. Uwaydah and in favor of GEMS is warranted.

Count 6 – Fraud

In reliance on Dr. Uwaydah's promise that GEMS would be paid in full upon delivery of the CT Scanner to ABIG in Saudi Arabia, which was made on behalf of Prometheus, GEMS shipped the CT Scanner. Prometheus, however, has failed to pay the remaining $963,000 balance of the contract price. Accordingly, and because Prometheus is Dr. Uwaydah's *alter ego*, GEMS is entitled to summary judgment for fraud against Dr. Uwaydah based on his misrepresentations to GEMS, which has caused GEMS to suffer $963,000 in damages.

III. CONCLUSION

For the foregoing reasons, summary judgment in favor of GEMS and against Dr. Munir Uwaydah is hereby **GRANTED** as to Count 1 (Breach of Contract), Count 4 (Alter Ego), Count 5 (Conversion) and Count 6 (Fraud). Judgment in the amount of $963,000, which is inclusive of all liability for the aforementioned counts, is rendered in favor of GEMS and against Dr. Munir Uwaydah. Dr. Uwaydah shall further pay to GEMS pre-judgment interests from November 27, 2001 to the date of this Order; and post-judgment interest at the statutory rate until the aforementioned judgment is satisfied.

Further, and pursuant to Federal Rule of Civil Procedure 54(b), the Court finds that, even though summary judgment is granted herein only against Dr. Uwaydah, there exists no just reason for delay in entering judgment against Dr. Uwaydah, especially in light of the fact Prometheus is currently in bankruptcy and it is unlikely that it would ever be able to satisfy any judgment rendered against it, if that were to occur.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: August 5, 2005

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02cv1844

[Filed August 5, 2005]

GENERAL ELECTRIC MEDICAL SYSTEMS EUROPE, INC.,
Plaintiff,

v.

PROMETHEUS HEALTH IMAGING, INC., et al.,
Defendants.

JUDGE KATHLEEN O'MALLEY

JUDGMENT

For the reasons set forth in the Court's order of this date, Plaintiff General Electric Systems Europe's ("GEMS") *Motion for Summary Judgment Against Defendant Dr. Munir Uwaydah* (Doc. 66) is hereby **GRANTED** as to Count 1 (Breach of Contract), Count 4 (Alter Ego), Count 5 (Conversion) and Count 6 (Fraud). Pursuant to Federal Rule

of Civil Procedure 54(b), the Court finds that, even though summary judgment is granted only against Dr. Uwaydah, there exists no just reason for delay in entering judgment against Dr. Uwaydah, especially in light of the fact Prometheus is currently in bankruptcy and it is unlikely that it would ever be able to satisfy any judgment rendered against it.

Accordingly, **JUDGMENT IS HEREBY ENTERED** in the amount of $963,000, which is inclusive of all liability for the aforementioned counts, in favor of GEMS and against Dr. Munir Uwaydah. Dr. Uwaydah shall further pay to GEMS pre-judgment interests from November 27, 2001 to the date of this Order; and post-judgment interest at the statutory rate until the aforementioned judgment is satisfied.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: August 5, 2005

EXHIBIT E

Wire Transfer Agreement dated 11/29/01

Blominvest Bank Statement Account

[fold out exhibits, see following pages]

APPENDIX F

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b)The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 USCS § 666(a)(7)];

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 USCS §§ 664 and 666(a)(3)] or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 USCS §§ 601 et seq.];

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS § 546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS § 547(e)(2)(A)];

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) [Deleted]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559 [11 USCS § 559]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559 [11 USCS § 559]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 [46 USCS §§ 53701 et seq.] or NK"http://www.lexis.com/research/buttonTFLink?_m=6e33e746d4955b9433826fbd9c1400a3&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b11%2

0USCS%20%a7%20362%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=25&_butInline=1&_butinfo=46%20USC%20109&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAt&_md5=6f5b16264122ab97f469636fc58a103a"\t"_parent"section 109(h) of title 49 [49 USCS § 109(h)], or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46 [46 USCS§§ 53701 et seq.];

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 [ERLINK"http://www.lexis.com/research/buttonTFLink?_m=6e33e746d4955b9433826fbd9c1400a3&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b11%20USCS%20%a7%20362%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=28&_butInline=1&_butinfo=20%20USC%201085&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbV1z-

zSkAt&_md5=4942e8fbdd08a1394b0df5adba4ed619"\t"_parent"20 USCS § 1085(j)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560 [11 USCS § 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560 [11 USCS § 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986 [26 USCS § 401, 403, 408, 408A, 414, 457, or 501(c)], that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1108(b)(1)] or is subject to section 72(p) of the Internal Revenue Code of 1986 [26 USCS § 72(p)]; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5 [5 USCS §§ 8431 et seq,], that satisfies the requirements of section 8433(g) of such title [26 USCS § 8433(g)];

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d) [26 USCS § 414(d)], or a contract or account under section 403(b) [26 USCS § 403(b)], of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential

property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 [11 USCS § 544] and that is not avoidable under section 549 [11 USCS § 549];

(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice

and a hearing, grants the taxing authority adequate protection (within the meaning of section 361 [11 USCS § 361]) for the secured claim of such authority in the setoff under section 506(a) [11 USCS § 506(a)];

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act [42 USCS § 1320a-7b(f)] pursuant to title XI or XVIII of such Act [42 USCS §§ 1301 et seq. or 1395 et seq.]).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13

[ERLINK"http://www.lexis.com/research/buttonTFLink?_m=6e33e746d4955b9433826fbd9c1400a3&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b11%20USCS%20%a7%20362%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=76&_butInline=1&_butinfo=11%20USC%20701&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAt&_md5=b2dcdcc3954c69aaaa6ccdeeeb24b4c0"\t"_parent"11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title [11 USCS §§ 101 et seq.] or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] or any other reason to conclude that the later case will be concluded-

(aa) if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge; or

(bb) if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4) (A) (i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge, and if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that

(i)may, in the debtor's sole discretion, notwithstanding section 363(c)(2) [11 USCS § 363(c)(2)], be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e) (1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless

the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless--

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended--

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) (1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to

personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2) [11 USCS § 521(a)(2)]-

(A) to file timely any statement of intention required under section 521(a)(2) [11 USCS § 521(a)(2)] with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722 [11 USCS § 722], enter into an agreement of the kind specified in section 524(c) [11 USCS § 524(c)] applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) [11 USCS § 365(p)] if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2) [11 USCS § 521(a)(2)], after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] is dismissed due

to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k) (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l) (1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that--

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the

debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankrupcty law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3) (A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)--

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)--

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the

applicability of the exception to the stay under subsection (b)(22).

(5) (A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify--

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m) (1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2) (A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied--

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)--

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n) (1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor--

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply--

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if--

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [11 USCS § 329(b), 363(n), 543, 550, 553, or 723].

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [11 USCS § 510(c) or 551].

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A) (i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title [11 USCS § 365 or 544(a)(3)]; or

(B) (i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title [11 USCS § 365 or 542];

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986 [26 USCS § 530(b)(1)]) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds--

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986 [26 USCS § 4973(e)]); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $ 5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 [26 USCS § 529(b)(1)(A)] under a qualified State tuition program (as

defined in section 529(b)(1) of such Code [26 USCS § 529(b)(1)]) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code [26 USCS § 529(b)(7)] with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $ 5,000;

(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1001 et seq.] or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986 [26 USCS § 414(d)];

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986 [PERLINK"http://www.lexis.com/research/buttonTFLink?_m=872d742fed8373710e6e9867df004f3d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5

b11%20USCS%20%a7%20541%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=31&_butInline=1&_butinfo=26%20USC%20457&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAt&_md5=0e7caea775bc54e31a3a24c9393ee1fb"\t"_parent"26 USCS § 457]; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986 [26 USCS § 403(b)]; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2) [11 USCS § 1325(b)(2)]; or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1001 et seq.] or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986 [26 USCS § 414(d)];

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986 [26 USCS § 457]; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986 [26 USCS § 403(b)];

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2) [11 USCS § 1325(b)(2)]; or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5 [11 USCS §§ 541 et seq.], any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than

securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b) [11 USCS § 108(b)]; or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c) (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section

notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's

household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) of such Code [26 USCS § 501(a)] may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the

adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign

state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335 [28 USCS § 1335], and section 1441 [28 USCS § 1441], an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $ 75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 USCS § 1441]--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall

be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) (1) In this subsection--

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed u n d e r NK"http://www.lexis.com/research/buttonTFLink?_m=40b69d5c2895e3ee188b290eb94e5192&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b28%20USCS%20%a7%201332%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=8&_butInline=1&_butinfo=USCS%20FED%20RULES%20CIV%20PROC%20R%2023&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAt&_md5=d16848ec2e1e4b3dff1af3864b7da414"\t"_parent"rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A) (i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453 [28 USCS § 1453], an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453 [28 USCS § 1453], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) (i) As used in subparagraph (A), the term "mass

action" means any civil action (except a civil action within the scope of section 1711(2) [28 USCS § 1711(2)]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C) (i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 [28 USCS § 1407], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407 [28 USCS § 1407].

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.